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No. 87-1187

Supreme Court, U.S.  
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In the  
**SUPREME COURT OF THE UNITED STATES**  
October Term, 1987

**THE HONORABLE ALCEE L. HASTINGS,**  
**UNITED STATES DISTRICT JUDGE,**

*Petitioner,*

v.

**THE JUDICIAL CONFERENCE**  
**OF THE UNITED STATES, et al.,**

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court  
of Appeals for the District of Columbia Circuit*

**PETITIONER'S REPLY**

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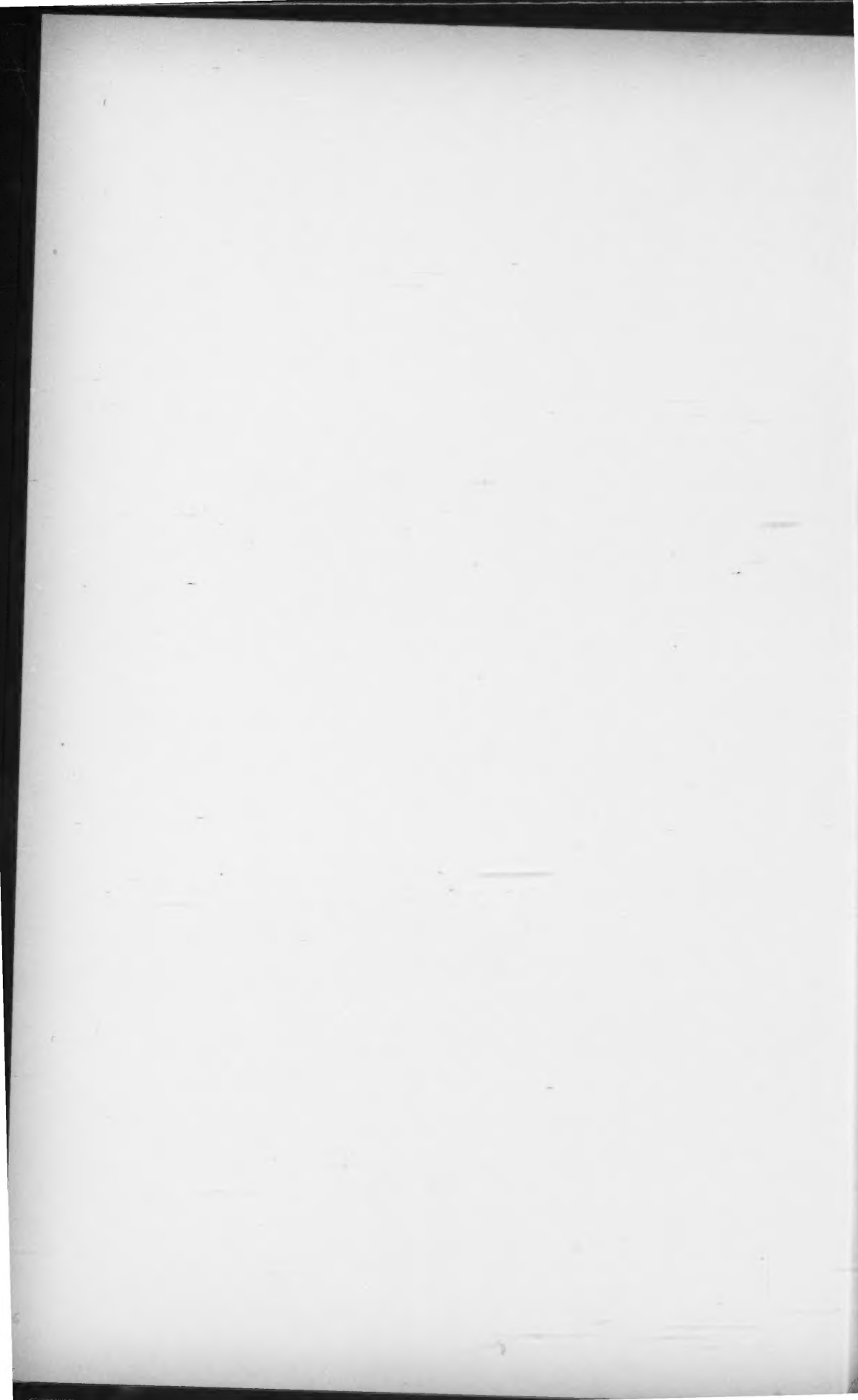
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March 29, 1988

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## TABLE OF AUTHORITIES

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**PETITIONER'S REPLY**

In petitioner's view, both of the  
briefs filed in response to the petition  
illustrate and confirm reasons why the  
Court should grant review in this case.  
Petitioner submits this reply to apprise  
the Court of the basis for that view and

to respond to matters presented in those briefs that might otherwise be misleading.

1. The Solicitor General's brief in opposition does not address or dispute the importance of the constitutional questions presented.<sup>1</sup> The brief, instead, is largely confined to an argument that the issues were thoroughly considered and correctly decided by the court below and in the related litigation that preceded that decision. After proper briefing and argument on the merits, the Court may itself reach that conclusion. That is not, however, a decision that the Court can or should make in deciding whether to grant a petition that poses constitutional ques-

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1. Brief for United States in Opposition ("U.S. Br."). The Solicitor General has filed a brief on behalf of four of the ten respondents -- the Judicial Conference of the United States, the Chief Justice of the United States, the Conference's Committee to Review Circuit Council Conduct and Disability Orders, and the United States. U.S. Br. at n. 1. The remaining respondents are separately represented. See note 4 infra.

tions of first impression and substantial importance. The decision the Court must immediately make is whether the questions presented are such that authoritative resolution by this Court is required.

The importance of those questions is not open to serious debate. The petition asks the Court to consider and authoritatively determine the constitutionality of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "Act").<sup>2</sup> The then members of this Court debated the need for some such legislation in 1970. Chandler v. Judicial Council of the Tenth Circuit, 395 U.S. 74 (1970). Although they were divided on that issue, each of the participating Justices recognized that any such plan would necessarily pose constitutional questions of a sub-

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2. Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified as amended at 28 U.S.C. §§ 331, 332, 372(c), 604(h) (1982 & Supp. 1984).

stantial nature. Both the nature and importance of those issues has been confirmed by the published debates that have preceded and followed the adoption of the Act. The decision below and those in the related litigation confirm that conclusion.<sup>3</sup>

The present petition asks the Court to determine whether the specific statutory plan embodied in the 1980 Act can be reconciled with the constitutional plan embodied in the 200-year old Constitution. The issues raised are issues that only this Court can resolve. They are not issues that can properly be left for resolution in litigation in the lower courts of the kind that preceded the decision below. This case presents a proper record for the

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3. These points are developed more fully in petitioner's Petition for Writ of Certiorari ("Pet.") at 4-6 and 29-30. The supporting authorities are identified in the text and accompanying notes presented there.



Court's consideration. The Solicitor General's views on the merits of the issues do not undermine the need for this Court to resolve them authoritatively in this case.

2. The Eleventh Circuit respondents do not oppose the grant of review, but argue that it should be limited to the certification and facial due process issues.<sup>4</sup> Petitioner agrees that those two issues, standing alone, are sufficiently important to merit review by this Court. He submits, however, that the arguments that the

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4. Brief of Respondents the Judicial Council of the Eleventh Circuit and Hon. John C. Godbold, Circuit Judge, Hon. Gerald B. Tjoflat, Circuit Judge, Hon. Frank M. Johnson, Jr., Circuit Judge, Hon. Sam C. Pointer, District Judge and Hon. William C. O'Kelley, District Judge in Opposition to Petition for Writ of Certiorari ("11th Cir. Br."). The special committee appointed to investigate the complaint filed in 1983 retained Mr. John Doar, initially as their chief investigator and later as their chief counsel. Mr. Doar has represented the Eleventh Circuit respondents in all subsequent matters involving Judge Hastings.

scope of review should be limited by the order granting the writ are premature. After full argument, the Court might decide that prudential concerns such as those identified dictated limiting its decision to only those or other specific issues. Petitioner submits that the Court should not handicap itself, at this stage, by limiting the scope of review on the partial record now before it. Instead, the petition should be granted, and questions concerning the scope of the review should be deferred until the Court has received full briefing and heard argument at which questions concerning the proper scope of review may be fully explored along with the merits.

3. There are two additional aspects of the brief submitted by the Solicitor General that require comment. The Solicitor General misperceives the question pre-

sented.<sup>5</sup> The suit below sought a declaratory judgment that the Act is unconstitutional. Petitioner sought to enjoin the Conference from certifying certain proceedings against him to the House only to preserve the status quo. Petitioner has long since abandoned any claim for injunctive relief with respect to those proceedings. He did not suggest in the court of appeals and does suggest in this Court that any relief against the House is appropriate in this case. His challenges are no longer directed at those proceedings except as they bear upon the need for declaratory relief to prevent similar proceedings in the future.<sup>6</sup>

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5. U.S. Br. at (I); cf. 11th Cir. Br. at i; Pet. at i-iii.

6. The impeachment inquiry provoked by the Conference's certificate is still before the Criminal Justice Subcommittee of the House Committee on the Judiciary. Insofar as counsel for petitioner is aware, no hearings have been held. The prospect that the House would impeach and the Senate convict a judge on charges upon which a jury acquitted him more than five years

The Solicitor General's brief also ignores the fact that there are two additional complaints against petitioner that are being investigated pursuant to the Act -- one urging that he be sanctioned for giving a political speech in a church and the other alleging that he improperly disclosed to a third party confidential information he acquired in the course of his duties as a judge. The existence of those proceedings makes it clear that the claimed injury to petitioner is ongoing and that meaningful relief can still be afforded.<sup>7</sup>

4. Both responsive briefs properly devote considerable attention to the proceedings against petitioner under the Act

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ago seems remote, and petitioner submits that it should not be a factor here. In any event, if petitioner were impeached and removed before a decision was reached in this case, the Court might then consider whether the writ should be vacated as improvidently granted.

7. See Pet. at 11, 17-19.

and to petitioner's persistent efforts to obtain a definitive adjudication of the constitutionality of the Act.<sup>8</sup> As petitioner reads those briefs, the Solicitor General takes the position that petitioner has achieved that objective and the issues do not require or merit this Court's attention.<sup>9</sup> The Eleventh Circuit respondents, although agreeing that narrow review may now be appropriate, implicitly criticize petitioner for the very vigor and aggressiveness with which he has pursued his challenges to their authority.<sup>10</sup> Both positions provide additional reasons why review should be granted rather than denied in this case.

The Court will have to determine the constitutionality of the Act at some point. The very vigor with which peti-

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8. U.S. Br. at 4-7; 11th Cir. Br. at 4-17.

9. U.S. Br. at 11-17.

10. 11th Cir. Br. at 6-19.

tioner has pursued his claims and with which respondents have exercised the powers they claim under the Act has created a record that presents the issues concretely and that will facilitate their proper adjudication by this Court. The burdens that petitioner has assumed and that the litigation and administrative proceedings have imposed upon the respondents and the courts as well as him are not the kinds of burdens that should have to be assumed or imposed again simply to create again the record necessary to a proper adjudication by this Court. Only a decision by this Court in this case can eliminate the need for such a repetition. In petitioner's view, that provides an additional reason why review should be granted here.<sup>11</sup>

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11. The Court's decision to grant review in Morrison v. Olson, No. 87-1279, prob. juris. noted 56 U.S.L.W. 3568 (Feb. 22, 1988), also supports the view that review should be granted here. The Court has already agreed to determine whether the appointment and supervisory powers

Accordingly, petitioner respectfully submits that the petition should be granted so that the questions presented may be considered and resolved by this Court.

Respectfully submitted,

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assigned the courts with respect to independent counsel appointed to investigate and prosecute officers of the executive branch are consistent with the constitutionally mandated allocation and separation of powers. The presence of similar issues makes review appropriate in this case also.